HEALTHCARE PRACTICE ENHANCEMENT NETWORK, INC.

CONTRACT NO. None **VABCA-5864E**

VA MEDICAL CENTER
LOMA LINDA, CALIFORNIA

Jack Paul, Esq., Los Angeles, California, for the Appellant.

Rheba C. Heggs, Esq., Trial Attorney; ***Philip S. Kauffman, Esq.***, Deputy Assistant General Counsel; and ***Phillipa L. Anderson, Esq.***, Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

OPINION BY ADMINISTRATIVE JUDGE PULLARA

Healthcare Practice Enhancement Network, Inc. (Applicant, Contractor or HPEN), seeks attorney fees under the *Equal Access to Justice Act* (*EAJA*), 5 U.S.C. § 504, following our decision in ***Healthcare Practice Enhancement Network, Inc.,*** VABCA No. 5864, 01-1 BCA ¶ 31,383, *recon. den.,* VABCA No. 5864R, 01-2 BCA ¶ 31,473. HPEN asserts that it meets the eligibility requirements of the *EAJA* with respect to its net worth and number of employees, and that it is a prevailing party. The Department of Veterans Affairs (VA or Government) does not challenge those assertions. The application includes a detailed listing of attorney hours totaling 172.6 for which HPEN seeks $21,575, calculated at the rate of $125 per hour. The Board finds that HPEN is eligible for consideration of the award sought under the *EAJA* and is a prevailing party.

Where the parties differ, however, and what we must now decide, is whether the Government's position in the litigation was substantially justified. Essentially, subparagraph (a)(1) of the *EAJA* states that a prevailing party shall be awarded attorney fees unless it is determined that the position of the Government was substantially justified.

HPEN alleges that the position of the Government in contesting HPEN's claim for relief and rejecting any further payment was not substantially justified. The Government replied:

> Once that allegation is made, the burden of persuasion shifts to Respondent to show, by a preponderance of the evidence, substantial justification. 5 U.S.C. ¶ 504(a)(2); ***Hopkins Heating & Cooling, Inc.***, VABCA No. 4905E & 4906E, 98-1 BCA ¶ 29,449 (1997). The Supreme Court, in ***Pierce v. Underwood***, 487 U.S. 552, 565 (1988), explained that a loss on the merits does not equate to an absence of substantial justification of the Government's position. The Court stated that the Government has the burden of establishing that its litigation position was "'justified in substance or in the main', that is justified to a degree that could satisfy a reasonable person."

In order to evaluate the Government's position, we begin with a summary review of the underlying decision.

In April 1997, the VA Medical Center, Loma Linda, California (Loma Linda) needed a financial plan. A Financial Planning Committee was created, which included Loma Linda's Director, Contracting Officer (CO), Chief Financial Officer (CFO), and other officials. The CFO, who was also the Committee Chairman, had no contracting authority but had primary responsibility for producing the financial plan. He was authorized by the Director and the Committee to spend $5,000 to hire a consultant to assist in development of the financial plan.

In May 1997, the CFO entered into a four-page contract prepared by HPEN for the needed services. The contract called for a financial plan to be submitted by the end of June 1997 and provided for payment to HPEN based on billings at hourly rates ranging from $75 to $275 per hour, plus expenses. No ceiling was stated.

HPEN met frequently thereafter with the CFO and the Committee, including the Director, the CO and other Loma Linda officials. HPEN submitted

a draft report in late June 1997, a final report in mid-July 1997 and a one-hour oral presentation of the plan in mid-September 1997, which was well-received by a large number of Loma Linda officials. In the meantime, HPEN had been billing monthly for its hours and expenses and had received payments from the CFO totaling $48,568.60 covering May and June 1997.

HPEN continued working and billing into early November 1997 in connection with implementation of the financial plan and eventually billed an additional $38,460.82, covering July through November 1997, for a contract total of $87,029.42.

In late October or early November 1997, officials at Loma Linda other than the CFO became aware of the foregoing payments and billings. HPEN was told to stop work. When it did not receive payment of the outstanding balance of $38,460.82, HPEN requested a final decision on the matter. The Contracting Officer responded that he could only render a final decision on a contract awarded by him or a member of his staff acting within the scope of his authority and that HPEN had entered into an agreement with a non-contracting officer, the CFO, who had no authority to commit the Government. The CO also stated that the agreement was unauthorized and had not been ratified. He concluded that he had no legal authority to issue a final decision. HPEN's appeal from a CO's failure to issue a final decision was duly received and docketed by the Board.

At the hearing in this matter, the Government's position was that the CFO did not have contracting authority, that the CFO's agreement with HPEN had not been ratified, that no valid contract came into existence, and that the only basis upon which HPEN could be paid was *quantum meruit*, or the reasonable value of the benefit received by the Government.

In our decision on the merits, we rejected several theories of contract formation raised by HPEN but, with respect to the ratification theory, we found as follows:

> We conclude that, in cases in which a Government official,

though lacking actual contracting authority, enters into an agreement with a contractor to provide something of value that the Government needs and receives as a benefit, and *either* an authorized CO knew or should have known about it [***Williams v. United States***, 130 Ct.Cl. 435, 127 F.Supp. 617, *cert. denied*, 349 U.S. 938 (1955)] *or* the non-authorized Government official who entered the agreement was a senior, or high level, official [***Silverman v. United States***, 230 Ct. Cl. 701, 679 F.2d 865 (1982)], then the Government is liable to compensate the contractor.

In the instant case, we find both ***Williams*** and ***Silverman*** to be applicable. Here, there was a written agreement executed by Mr. Gil, the Chief Fiscal Officer, equating to a labor-hour contract, in which VA agreed to pay for HPEN's hours of effort to produce the financial plan at the agreed upon range of rates. That agreement was institutionally ratified by the actions of the Committee which included the CO as a member. VA sought and received the benefit of HPEN's performance, which substantially conformed to the statement of work in the engagement letter and which, until HPEN sought payment of the unpaid amount, VA accepted with enthusiasm and praise.

Here the CO participated as a member of the Financial Planning Committee in authorizing Mr. Gil to secure a consultant. The CO participated in subsequent meetings and conversations with HPEN, and knew or should have known of the consultant's extensive activities throughout performance of this contract, which went on for months. In addition, we have the most senior officials of Loma Linda participating in these events. Granted, the record does not show that Mr. Ford, Mr. Stordahl, Ms. Gillespie or any other member of the Committee had actual knowledge of the terms of the letter of engagement or the payments thereunder until early November 1997. However, the top officials at Loma Linda were, or should have been aware, that some form of agreement existed and that a high level of activity was being performed under their direction by professional consultants who are normally well paid. We find this to be a clear case of "institutional ratification." We hold that the Contractor is entitled to be paid fairly for its work of producing the financial report.

With respect to quantum we stated as follows:

> Compensation is either in accordance with the terms of the agreement, if determinable, or under principles of *quantum meruit*. . . . we do not limit our review to the unpaid amount of $38,460.82. Rather, we will review the entire amount invoiced [$87,029.42] and determine the appropriate compensation under the terms of the agreement. . . . [After disallowing certain hours or rates claimed by HPEN,] we determine that Appellant's invoiced amount of $87,029.42 should be reduced by the sum of $26,357.94 ($4,312.50, $20,900.44 and $1,145.00) to the amount of $60,671.48, or a balance due of $12,102.88 ($60,671.48 less the $48,568.60 previously paid). . . . We agree that HPEN is not entitled to the entire $38,460 sought but do not find any basis for allowing other than the $12,102.88 amount we have determined above under the terms of the ratified contract, relative to producing a financial plan. The Government simply has not demonstrated that the benefit to it is any less than that and we are provided no specific alternate amount for the value of the benefit received.

The Government argues that its position in litigation, denying the existence of a valid contract, was substantially justified because "neither the Federal Circuit nor the Court of Federal Claims has established clear precedent on the doctrine of institutional ratification." Also, the Government argues, the Board's rejection of a number of HPEN's proposed theories of contract formation demonstrates that the Government's litigation position was substantially justified. Finally, the Government argues that its position in the litigation "concerned not entitlement, but the measure of recovery under prevailing law." That is, entitlement arose only under principles of *quantum meruit* and no additional compensation was warranted because the value of the benefit conferred to the medical center value equaled no more than the amount already paid, *i.e.*, $48,568.60.

With respect to the Government's position regarding contract formation, it succeeded in persuading the Board that several of HPEN's theories should not

prevail. However, with respect to ratification, we do not find the Government's position to have been substantially justified. It may be, as the Government points out, that the theory of institutional ratification is still an unsettled area of the law, but that is of little solace to the Government in this case. First, we did not rely solely on institutional ratification but also found Contracting Officer ratification in the circumstances of this case, as set forth in the quotation above. Second, we found this to be a "clear case of institutional ratification." In other words, considering the degree and extent of participation in the work effort among the CFO, HPEN, the Committee and its members, including senior officials and the Contracting Officer, over an extended period of time, this case would seem to be the "poster child" for institutional ratification.

With respect to the Government's litigation position regarding quantum, we do not find that it was substantially justified for a number of reasons. The Government states that throughout the litigation, it "never challenged Appellant's entitlement to be paid fairly for consultant services it provided" to Loma Linda. This representation is not entirely accurate since the Government did vigorously challenge ratification, which we consider to be an entitlement issue. Moreover, the Government never suggested, offered or identified any specific sum or amount that it considered to be "fair." The Government simply said that such amount should be no more than the $48,568.60 previously paid, leaving open the possibility that it should be considerably less. In that regard, the Government never clarified whether it might seek a refund of all or any portion of the amount previously paid. Government witnesses at the hearing offered their opinions that the value of the work done was in the range of only $5,000 to $7,000, based on their perspectives and experiences with previous consulting contracts. However, we gave those estimates little credence where the estimators indicated dismay that HPEN charged for travel time, meetings, and review of documents to learn how the VA operated. Time is a consultant's stock in trade and we would be surprised if one did not seek to be paid for all

time devoted to performing consulting work. Frankly, there appeared to be a certain degree of inexperience or naivete on the part of the officials involved, and comparisons were frequently made with medical consulting work, which we did not consider germane. Based on the foregoing, therefore, the Board understood that the entire amount invoiced, $87,029.42, and not just the unpaid amount of $38,460.82, was "on the table," as is indicated in the quotation from the decision on the merits above.

Neither party addressed the possibility of allocating the attorney fees on the basis that HPEN did not prevail on all its contract formation arguments, nor are we inclined to do so in the circumstances of this case. The fact that the Government's positions prevailed in certain areas did not diminish, in this instance, HPEN's recovery. Nor are we inclined to reduce the attorney fee award simply due to the facts that HPEN recovered only $12,102.88 of the $38,460.82 sought and incurred attorney fees of $21,575. The more accurate way to view the outcome in this case is that HPEN was obliged to litigate virtually the entire $87,029.42 in billings in order to be awarded $60,671.48, of which $48,568.60 had been paid previously. We find the attorney fees in this case to be fair and reasonable.

DECISION

Applicant is entitled to an EAJA award of $21,575 in connection with the captioned appeal.

Date: **February 14, 2002**

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MORRIS PULLARA, JR.
Administrative Judge
Panel Chairman

We Concur:

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JAMES K. ROBINSON
Administrative Judge

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RICHARD W. KREMPASKY
Administrative Judge